Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 96-182

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

AMERICAN DEPOSIT CORP. and
BLACKFEET NATIONAL BANK,

Petitioners,

v.

JAMES W. SCHACHT, individually and as
Acting Director of Insurance of the State of Illinois,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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August 30, 1996

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QUESTIONS PRESENTED

The *amicus curiae* adopts the petitioners' statement of questions presented.

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BRIEF OF INDEPENDENT BANKERS ASSOCIATION OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

Independent Bankers Association of Texas ("IBAT") supports the petition for certiorari filed by American Deposit Corp. and Blackfeet National Bank and respectfully urges the Court to grant it. Petitioners and respondent have consented to the filing of this brief and their consents have been lodged with the Clerk.

I. Interest of the *Amicus Curiae*

IBAT is a trade association of some 700 banks located in communities throughout Texas. All are independent community banks; to be a member of IBAT a bank must satisfy at least two of three criteria, *viz.*, it must be locally owned, locally controlled, and/or primarily local in its lending and other banking activities. Many of IBAT's members are national banks, but all its members, whether chartered under federal or Texas law, have an interest in determinations as to the powers of national banks, because state-chartered banks in Texas are authorized by Texas law to conduct any activity that a

national bank may conduct. Texas Constitution, Article 16, § 16(c).

IBAT has licensed the Retirement CD from petitioner American Deposit Corp. on behalf of its members, many of whom are prepared to offer their customers the opportunity to open Retirement CD accounts once the obstacles raised by the efforts of the life insurance industry to block its competition have been cleared. The majority of IBAT's members are small community banks which perform unique and invaluable services to the economies of their communities. The Retirement CD offers a means for such banks to obtain the long-term core deposits which such banks must have if they are to serve their community needs.

IBAT believes that its perspective enables it to be of material assistance to the Court.

II. Summary of Argument

The decision of the court of appeals has a damaging and disruptive effect on national banks, contrary to national policy, and its effects will be felt by state-chartered banks as well. **First**, the concept of what constitutes "insurance" that was adopted by the court of appeals means that every fixed-rate interest-bearing bank deposit is "insurance" subject to the vagaries of state insurance regulation. **Second**, contrary to the federal policy of national uniformity underlying the National Bank Act, the decision imposes on national banks the conflicting requirements of 50 states and their insurance commissioners. **Third**, the decision has a chilling effect on national banks' ability to develop new products. **Finally**, its effect will be felt by state-chartered banks as well as by national banks. The petition for certiorari should be granted and the court of appeals' decision should be reversed.

III. Argument

IBAT is profoundly concerned by the implications of the majority opinion in this case. Its approach to what

constitutes "insurance" for purposes of the McCarran-Ferguson Act leaves it open to states to prohibit or interfere with fundamental, normal, and historic banking functions of national banks on the pretext of "regulating the business of insurance." The majority opinion in the court of appeals gives states extraordinarily wide latitude to do so, by the breadth of its definition of "insurance."

Most extraordinary is the majority's approach to the transfer of risk characteristic of insurance. The majority characterized the Retirement CD as insurance — insurance in the strict, legal, technical sense — against a decline in the interest-rate market:

> "By providing a guaranteed minimum return on investment, the Retirement CD insures the purchaser against a decline in the market a single, contingent event. The purchaser is given the comfort that should a depression occur in the market, causing rates of interest to fall significantly, he will not suffer a 'loss' of future income, but will continue to receive the rate of interest guaranteed in his Retirement CD contract."

App. 13a.

This is exactly what every bank does when it opens an account bearing a fixed rate of interest, no matter how short its term. *Any* depositor who buys, say, a 90-day certificate of deposit (or a six-month, one-year, or three-year or more, CD; the same principles apply to any period) bearing interest at, say, 6%, has "insured himself against a decline in the market"; he is "given the comfort that should a depression occur in the market, causing rates of interest to fall significantly, he will not suffer a 'loss' of future income, but will continue to receive the rate of interest guaranteed in his" CD. He has transferred to the bank the risk that the rate of return on money may fall below 6% during the term of the CD. In turn, the bank assumes that risk, and gambles that it will be able to make more by lending out the money than it is

obliged to pay the depositor. It spreads that risk by lending the money to a variety of borrowers on various terms. Thus, on the majority's reasoning, one of the most fundamental of banking activities the acceptance of fixed-rate interest-bearing deposits is "insurance."

A second ground of concern to IBAT is that the decision imposes on national banks the conflicting requirements of 50 states and their insurance commissioners. A bank deposit contract is normally governed by the law of the situs of the bank. *Cf. Smiley* v. *Citibank (South Dakota) N.A.*, 135 L.Ed. 25 (1996). Hence, in keeping with the national policy behind the National Bank Act, in its banking activities a national bank is normally only concerned with federal law and such provisions of local law as Congress has made applicable. But under this decision, any deposit that can be labeled "insurance" is subject to regulation by the *depositor's* state, imposing on national banks a checkerboard pattern of requirements depending on the location of each individual depositor or potential depositor.

Yet another result of the decision is a chilling effect on national banks' ability to develop new products. Congress, the Comptroller of the Currency, and the courts have often recognized that dynamic and creative banking, responsive to the changing needs of the public, is in the public interest, and that "the powers of national banks must be construed so as to permit the use of new ways of conducting the very old business of banking." *M&M Leasing Corporation* v. *Seattle First National Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978). But given the lack of any clear outer limits to the free-wheeling conception of "insurance" adopted by the majority here, individual state insurance regulators often inspired by banks' competitors in the insurance industry can strangle an innovative product in its cradle merely by threatening to regulate it as "insurance."

Finally, the impact of the decision is not limited to national banks. In Texas as in many other states, state-chartered banks are authorized to conduct any activity that is authorized for national banks. Texas Constitution. Article 16, § 16(c). Under the Comptroller of the Currency's determination with respect to the Retirement CD, therefore, there is no question that state-chartered banks in Texas can accept Retirement CD deposits as freely as can national banks. While we believe that state-chartered banks have this authority as a matter of Texas law, the decision of the court of appeals casts a shadow on the independent authority conferred by the National Bank Act and the Constitution of the State of Texas.

IV. Conclusion

The decision of the court of appeals has a disastrous effect on ordinary traditional banking activities going far beyond the Retirement CD directly involved. It cannot be allowed to stand. We respectfully urge the Court to grant the petition for certiorari.

Respectfully submitted,

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